

APPEAL NO. 022352
FILED OCTOBER 31, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 20, 2002. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the respondent (carrier) did not waive its right to contest compensability under Section 409.021; and that the claimant did not have disability because she did not sustain a compensable injury. In her appeal, the claimant asserts error in each of those determinations. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer did not err in determining that the claimant did not sustain her burden of proving the causal connection between her employment and her bilateral upper extremity injury. There was conflicting evidence on the issue of causation. The claimant's treating doctors opined that there was a causal connection between her work and the injury to her upper extremities, while the doctors who reviewed medical records on behalf of the carrier opined that there was not a causal connection between the claimant's work and her injuries. Under Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence. As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. The hearing officer was acting within his province as the fact finder in determining that the claimant did not establish the causal connection between her employment and her bilateral upper extremity injury. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The affirmance of the hearing officer's determination that the claimant did not prove the causal connection between her employment and her bilateral upper extremity injury does not end the inquiry of whether the claimant sustained a compensable injury because a carrier waiver issue was also before the hearing officer. The carrier did not appeal the hearing officer's determination that it received written notice of the claimed injury on (alleged injury), and that it filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) contesting compensability on April 12, 2002. The claimant argues that the hearing officer erred in not applying the Texas Supreme Court's decision in Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). At the time of the hearing, the Commission had determined that the holding in Downs would not be

followed until the rehearing process was exhausted. TWCC Advisory No. 2002-08 (June 17, 2002). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and, as such, the Downs decision, along with the requirement to adhere to the seven-day "pay or dispute" provision, is final. Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002. As noted above, the carrier did not comply with the seven-day "pay or dispute" provision in this case in that it received written notice of the alleged injury on (alleged injury), and did not file the TWCC-21 disputing the injury until April 12, 2002. Accordingly, we reverse the hearing officer's determination that the carrier did not waive the right to contest compensability and render a new decision that the carrier did waive its right to contest compensability herein. Thus, we likewise reverse the determination that the claimant did not sustain a compensable occupational disease injury and render a new decision that the claimant sustained a compensable bilateral upper extremity injury, as a matter of law pursuant to Section 409.021. The carrier argues that because the claimant continued to be paid her full preinjury wage during the period of time she missed from work under the employer's salary continuation plan, there were no income benefits due to the claimant and, thus, the claimant "failed to show that Carrier failed to pay benefits properly." It is not necessarily unusual that a carrier may be required to contest compensability before entitlement to income benefits even accrues, particularly in light of the fact that entitlement to temporary income benefits . . . does not accrue until the eighth day of disability pursuant to Section 408.082(b). In addition, it is important to note that there is no delay in the entitlement to medical benefits reasonably related to the compensable injury. In any event, under our reading of the Downs decision, the carrier is required to take some action, by either contesting compensability or paying accrued benefits or agreeing to initiate benefits as they accrue, within seven days of the date it receives written notice of the claimed injury. In this case, the carrier did not do so and, accordingly, it waived its right to contest compensability.

The hearing officer made an unchallenged factual finding that the claimant was unable to obtain and retain employment at her preinjury wage due to her injury from March 20 to July 1, 2002. However, he determined that the claimant did not have disability based upon the determination that the claimant did not sustain a compensable injury. Given that we have reversed the hearing officer's injury determination and rendered a new decision that the claimant sustained a compensable injury as a matter of law under Section 409.021, we also reverse the determination that the claimant did not have disability and render a new determination that the claimant had disability from March 20 to July 1, 2002. Even though the claimant had disability for this period, she may not be entitled to TIBs if her post-injury earnings were equal to her preinjury wages. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2).

The hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment is affirmed. However, the determination that the claimant did not sustain a compensable injury is reversed and a new decision rendered that the claimant sustained a compensable injury, as a matter of law, because the carrier waived its right to contest compensability pursuant to Downs. The

determination that the claimant did not have disability is also reversed and a new decision rendered that the claimant had disability from March 20 to July 1, 2002.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST PAUL
DALLAS, TEXAS 75201.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the affirmance of the “no injury” findings. We may have an issue driven system at the Texas Workers’ Compensation Commission, but this does not mean that each issue is or should be reviewed in complete isolation from dependent issues also addressed at a contested case hearing. The consequence of “waiving” defenses is that the carrier has failed to join issue on whether a claimant was injured in the course and scope, and the claim of such injury thereby becomes a factual “given”. I believe this outcome is legally compelled, much like a deemed request for admission. If we continue to bifurcate the issues of injury and waiver as if the other issue was not present, I believe that notwithstanding our attempts to limit the applicability of Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), a reviewing court would still be struck by the anomaly of finding no injury and then finding that this noninjury became compensable.

Susan M. Kelley
Appeals Judge